IN THE HIGH COURT OF JUDICATURE AT BOBBY
CIVIL APPELLATE JURISDICTION

APPEAL FROM ORDER NO. 525 OF 1998

Shantilal Kundanmal Surana
and anr. .. Appellants

Vs.

Dayaram Gulzarilal Deval and anr. .. Respondents

Mr. P.R. Naidu for the appellants.
Mr. P.M. Havnur for Respondent No.1.
Ms. G.S. Joglekar for Respondent No.2

CORAM: **B.H. MARLAPALLE,J.**

DATED: **JUNE 7, 2005**

ORAL ORDER:

1. The present appellants are the defendant nos.1 and 2 respectively in L.C. Suit No.3727 of 1990 filed by the present respondent no.1 before the City Civil Court at Mumbai. In the said suit Notice of Motion No.2295 of 1998 was taken out by the plaintiff and by the impugned order dated 21/5/1998 the same was partly allowed. Prayer clause (a) was granted subject to deposit of cost quantified at Rs.500/- i.e. the Court Commissioner was appointed and in addition prayers (b) and (c) were also allowed. The said three prayers read as under :-

> (a) that pending the hearing and final disposal of the suit, a Court Commissioner be appointed at the cost of the plaintiff to visit

the suit site of Shop No.7, Chawl No.C-4 and also Room Nos.1 and 2, Chawl No.C-3 of the plaintiff's property known as Deval Punjabi Chawl, Golibar Road, Jawahar Nagar, Khar (East), Mumbai 400 051 and make a detailed report along with sketch and photograph as to the present condition of the suit premises and what are the activities actually going on at the suit site and produce the same before this Honourable Court.

(b) that the Court Commissioner so appointed by this Honourable Court be allowed to take help of Nirmal Nagar Police Station for carrying out the commission work in as much as the defendant No.1 is so strong a person that he claims to be the president of the Chawl committee and he would be in a position to collect hundreds of people and disturb the commission work and there is likelihood of breach of peace.

(c) that pending the hearing and final disposal of the suit, the defendants, their agents, servants, representatives, labourers and contractors be restrained by an order of injunction of this Honourable Court from in any manner carrying out any works of construction, additions, alterations or so called repairs without the landlord's permission and without Municipal prior permission in Shop No.7, Chawl No.C-4 and Room Nos.1 and 2, Chawl No.C-3 of plaintiff's suit property known as Deval Punjabi Chawl, Golibar Road, Jawahar Nagar, Khar (East), Mumbai 400 051 and status quo be ordered to be maintained in terms of Commissioner's report.

2. While admitting this appeal by order dated 10/2/1999 the impugned order was not stayed and, therefore, the Court Commissioner visited the suit premises and submitted his report before the trial court. The order of injunction granted in terms of prayer clause (c) has also been operative for all these years.

3. Mr. Naidu, the learned counsel for the appellants submits that the order appointing Court Commissioner is contrary to law in as much as the plaintiff's cannot be allowed to collect the evidence through Court Commissioner in support of the plaint and in this regard reliance has been placed on the decision in the case of **Sanjay Namdeo Khandare vs. Sahebrao Kachru Khandare and ors. 2001 (2) Mh.L.J. 959** decided by this court. In the said case it appears that for deciding the issue of possession of the suit property with the plaintiff, the Court Commissioner was appointed and, therefore, this court has held that such an evidence cannot be allowed to be collected by the plaintiff. The said decision is not applicable in the facts of this case as elaborately set out by the trial court in the impugned order.

4. At the threshold, it is required to be noticed that this court by an order dated 27/3/1998 had directed the present appellants to maintain status quo and in addition the pending suit was ordered to be expedited and disposed of within a period of six months. It was further pointed out to the trial court in the subject Notice of Motion that inspite of the order of status quo granted by this Court, the defendants had proceeded to

continue with the construction and in para 7 of the Court Commissioner's report the following undertaking/declaration of the defendant no.2 was noted:-

> "I say that I have no intention to carry out any alterations or any extension when there was no wall. I say that the first floor was in existence from very beginning and hence there is no question of constructing any upper floor."

5. It was also noted that notice under Section 354-A of the B.M.C. Act was issued against Surana General Stores, Golibar Road belonging to the defendant nos.1 and 2. The photographs produced by the defendants showed that there was no upper floor and the photographs produced by the plaintiff showed that there was construction going on relating to the upper part of the structure. It was under these circumstances, the trial court thought it fit to appoint the Court Commissioner. The reasoning set out by the trial court in support of the order impugned cannot be termed as erroneous and, therefore, no interference is called for in the said order. The challenge to the order thus fails as being devoid of merits. In the premises the appeal is hereby dismissed.

(B.H. Marlapalle,J.)